Supreme Court, U.S.
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No. 00-418

In The

Supreme Court of the United States

WILDENSTEIN & CO., INC.,

Petitioner,

vs.

GILBERT N. MICHAELS, individually,
and doing business as VISAGE FINE ART,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal
Of The State Of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

28 U.S.C. § 1367 codifies the supplemental jurisdiction of federal courts to hear state law claims which arise from the same Article III "case or controversy"as a case within the federal court's original jurisdiction. Subdivision (d) provides that the statute of limitations on such a pendent state claim is tolled while the case is in the federal court and for a period of 30 days following any dismissal by the federal court.

Does the well-settled power of Congress to provide for supplemental federal jurisdiction of state claims extend to providing for the effect of a timely federal filing on the state statute of limitations if the supplemental state claims are ultimately dismissed in an exercise of the federal court's discretion?

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JURISDICTION OF THIS COURT[1]

Although petitioner invokes 28 U.S.C. § 1257(a) as the basis of this court's jurisdiction, jurisdiction is lacking because an adequate state ground exists for the decision of the California Court of Appeal. That is, Wildenstein & Co. (hereafter Wildenstein or petitioner) asserted in the trial court and again on appeal that Michaels' claims were barred because they were stale and because respondent Gilbert N. Michaels (hereafter Michaels or respondent) had not brought himself within the parameters of the California state law "equitable tolling" doctrine. In rejecting Wildenstein's argument, the Court of Appeal found section 1367(d)'s plain language controlling. However, the court also found that section 1367(d) was in harmony with the state common law doctrine because all the elements required to invoke the state common law doctrine were necessarily met when Michaels refiled his state claims just eighteen days after they were dismissed by the federal judge in the exercise of her discretion under section 1367(c)(3). Contrary to Wildenstein's claim that section 1367(d) offends state sovereignty, the California court found that it "codified" state policy. "We do not see how a case filed within the time permitted by section 1367(d) could reasonably be described as 'stale.' " Petitioner's App. A at p. A-13.

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[1] Petitioner's statement of jurisdiction fails to indicate its compliance with the requirements of Supreme Court Rule 29.4(b). The petition calls into question the constitutionality of an act of Congress and 28 U.S.C. § 2403(a) may apply.

STATEMENT OF THE CASE[2]

A. Introduction

Gilbert Michaels purchased four works of fine art from Wildenstein & Co. on the fraudulent representation that at the collective $2,540,000 purchase price, Michaels could resell them for a fair profit. In fact, the collective fair market value of the paintings was no more than $1,150,000. That is, Michaels was cheated by at least $1,390,000 before any consideration of his profit on resale. In addition, and contrary to the express agreement of the parties, Wildenstein suborned Michaels' agent, Ross. Wildenstein secretly paid Ross at least $75,000 in commissions over and above the $122,500 Michaels paid Ross for the same sales. On the state of the record, under California law, Wildenstein has admitted these allegations for the purpose of its motion for summary judgment and demurrer in the trial court.

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[2] Wildenstein takes considerable liberty with the omission in Rule 14.1(g) of any requirement that the statement of the case be supported by citations to the record below. It discusses the issues as though the trial court properly made findings which were binding on the California appellate courts. The trial court dismissed Michaels' claims on demurrer for failure to state a claim (cf. Fed.R.Civ.Pro. 12(b)(6)) or summary judgment. No factual findings in the trial court are made on such proceedings which bind the California appellate courts. A demurrer admits all the properly pleaded facts in the complaint. *Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 38, 77 Cal.Rptr.2d 709 (1998). Summary judgments are reviewed "de novo." *Artiglio v. Corning Inc.*, 18 Cal.4th 604, 612, 76 Cal.Rptr.2d 479 (1998). In other words, under California state law, the opinions of the trial judge were irrelevant to the proceedings in the California appellate courts.

In June 1993, Michaels sued Wildenstein in the Central District of California alleging a RICO claim and several state law claims. Wildenstein has conceded that this filing was timely under the state statute of limitations. In November 1993, the case was transferred to the Southern District of New York on Wildenstein's motion. In June 1995, Michaels filed a second amended complaint which omitted his RICO claim. On motion by Wildenstein, the district court found that no diversity jurisdiction existed. Exercising its discretion under 28 U.S.C. § 1367(c)(3), the court then dismissed the pendent state claims. Michaels refiled the claims in the Los Angeles County Superior Court eighteen days later.

B. Facts[3]

> Between October 1989 and May 1991, Gilbert Michaels purchased four paintings from Wildenstein & Co., Inc., a New York art dealer, for a total of about $2.5 million.[4] At the times of Michaels' purchases, Wildenstein's representatives knew that Michaels intended to open a gallery and to resell the paintings at a profit.

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[3] Michaels quotes the facts as stated in the opinion of the California Court of Appeal. These factual statements supercede any contrary trial court factual findings.

[4] "[Court's footnote] On October 30, 1989, Michaels purchased Pierre-Auguste Renoir's "Trois Grenades et Deux Pommes" for $375,000. On October 10, 1990, Michaels purchased Albert Marquet's "Femme Nue Debout dans un Atelier" for $490,000. On December 8, 1990, Michaels purchased Renoir's L'Etang a Essoyes" for $650,000. On May 6, 1991, Michaels purchased Marquet's "Pin a Saint Tropez" for $1,025,000.

According to Michaels, he was told by the folks at Wildenstein that he was getting the paintings for "well below their market value" and, in the "near future," would be able to sell them at a profit.[5]

In May 1992, Michaels opened a gallery at the Peninsula Hotel in Beverly Hills. In July, Michaels asked Wildenstein about the current value of his paintings (so he would know how to price them for resale). In August, Wildenstein explained that, due to a decline in the art market, the paintings were probably worth no more than the amounts Michaels had paid for them. Michaels then turned to Sotheby's and Christie's, and was advised in August that the paintings were all worth considerably less than the amounts Michaels had paid for them.[6] Michaels asked Christie's and Sotheby's to double-check their estimates. In September and October,

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[5] [Michaels' footnote] The petition incorrectly claims that Michaels paid retail. Petition at 3. The truth is that Michaels paid more than retail. Wildenstein's fraudulent representation was that it was selling to Michaels at wholesale.

[6] "[Court's footnote] Christie's opined that Renoir's "Trois Grenades et Deux Pommes" (for which Michaels had paid $375,000) was worth $70,000 to $90,000; Sotheby's put it somewhere between $140,000 and $180,000. Christie's opined that Marquet's "Femme Nue Debout dans un Atelier" (for which Michaels had paid $490,000) was worth between $80,000 to $100,000; Sotheby's agreed. Christie's opined that Renoir's "L'Etang a Essoyes" (for which Michaels had paid $650,000) was worth $140,000 to $180,000; Sotheby's put it between $400,000 and $600,000. Christie's opined that Marquet's "Pin a Saint Tropez" (for which Michaels had paid $1,025,000) was worth between $120,000 and $160,000; Sotheby's put it at somewhere between $250,000 to $350,000.

Christie's and Sotheby's confirmed to Michaels that his paintings were then worth about $1.5 million less than the total he paid for them.

Michaels, aware of the depressed state of the art market, then asked Sotheby's to value the paintings as of the dates Michaels had purchased them from Wildenstein. On December 14, 1992, Sotheby's advised Michaels that, in the opinion of its experts, the paintings for which Michaels had paid about $2.5 million had been worth somewhere between $830,000 and $1.1 million at the time of Michaels' purchases.[7] Petitioner's App. A at A2-A4.

Michaels [later discovered] that, before he negotiated his purchases from Wildenstein, he had entered an agreement with an art expert, Larry Ross, pursuant to which Ross was to locate art works for acquisition by Michaels for resale at a profit. Michaels agreed to pay a commission to Ross, and Ross agreed that he would not accept a commission from any seller of art. Wildenstein knew about the agreement between

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[7] "[Court's footnote] More specifically, Sotheby's opined that Renoir's "Trois Grenades et Deux Pommes" (for which Michaels had paid $375,000) had then been worth between $250,000 and $300,000; that Marquet's "Femme Nue Debout dans un Atelier" (for which Michaels had paid $490,000) had then been worth between $80,000 and $100,000; that Renoir's "L'Etang a Essoyes" (for which Michaels had paid $650,000) had then been worth between $400,000 and $600,000; and that Marquet's "Pin a Saint Tropez" (for which Michaels had paid $1,025,000) had then been worth between $100,000 and $150,000. In September 1993, Christie's estimated the value of the four paintings, as of the dates of their purchase by Michaels, at $200,000 to $250,000, $120,000 to $160,000, $300,000 to $350,000 and $150,000 to $200,000, respectively.

> Michaels and Ross, and knew Ross was not to accept a commission from any seller. Wildenstein nevertheless paid "secret commissions" to Ross, then failed to disclose those payments. Michaels alleged that the payments to Ross by Wildenstein were acts of "commercial bribery" in violation of [Cal.] Penal Code section 641.3 and, therefore, acts of unfair competition. . . .

Petitioner's App. A at A6.

C. Trial Court Proceedings

Michaels filed suit in the federal district court for the Central District of California on June 28, 1993. He alleged a federal RICO claim and pendent state claims all arising out of Wildenstein's fraudulent art sales to him. Wildenstein's bribery of Ross was not discovered until later when Wildenstein produced checks to Ross in discovery. (CT[8] 552.) Wildenstein conceded that this filing was timely as to the state law pendent claims. "Under the California discovery rule, plaintiff had until August 26, 1993, to file this lawsuit. . . . " Wildenstein's Respondent's Brief in the Court of Appeal at 23. Thus, as of June 1993, Wildenstein had notice of and an opportunity to defend against Michaels' claims.

Wildenstein and its co-defendants aggressively attacked the pleadings. Wildenstein filed a motion to change venue and a motion attacking the RICO claim substantively for failure to state a claim. Fed.R.Civ.Pro. 12(b)(6). (CT 1053, 1064.) Wildenstein did not, however, challenge the federal court's subject matter jurisdiction

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[8] "CT" refers to the clerk's transcript on appeal below.

on the basis that the RICO claim was "insubstantial" from a jurisdictional point of view. The motion to dismiss was resolved by stipulation that Michaels would file a first amended complaint. (CT 1077.) The case was transferred to the Southern District of New York as Wildenstein requested.

No motion to attack the RICO claim was made in New York, either. No attempt to seek sanctions for bad faith was made. Most importantly, the New York court never adjudicated the claim or otherwise ruled on it. In 1995, Michaels filed a second amended complaint by which he withdrew his RICO claim and sought to base jurisdiction on diversity.

Again the California Court of Appeal states the facts aptly:

> Although it is true, as the trial court noted, that Michaels voluntarily abandoned his RICO claim, there is no suggestion that it was "absolutely devoid of merit or obviously frivolous" at the time Michaels' original complaint was filed in federal court. Accordingly, the strength of the RICO claim does not affect Michaels' right to rely on section 1367(d).[9] (Citation). In this

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[9] [Michaels' footnote] Wildenstein makes a serious misstatement when it asserts in the petition (at 3) that Michaels never validly invoked the federal court's jurisdiction. The California Court of Appeal expressly ruled otherwise, and the New York federal court's rulings only makes sense if the court believed the supplemental jurisdiction was properly invoked. "Once a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not 'insubstantial on their face,' (Citation.) 'no further consideration of the merits of the

> regard, we note that, for the entire time the RICO claim was pending – from June 1993 to June 1995 – Wildenstein did not challenge it on the merits, notwithstanding that Wildenstein did move to dismiss on procedural grounds, and did move to change venue.

Petitioner's App. A at A11 fn. 6.

Wildenstein attacked the second amended complaint on the ground "that diversity was incomplete." The federal court agreed, found that all parties were not of diverse citizenship at the time the federal action was filed, and concluded that, as a matter of discretion, it would decline to exercise supplemental jurisdiction over Michaels' remaining claims.

> From the transcript of the hearing on Wildenstein's motion to dismiss, it is obvious that the district court judge understood that her ruling would not terminate this dispute, and that Michaels' claims would simply proceed in a different forum. After the court announced its intent to dismiss, Wildenstein's lawyer mentioned that there were "some pending depositions" and suggested that they might all be "moot." The judge disagreed, commenting that, "I don't see why. You are going to need discovery wherever you go." Plainly, the district court judge was operating on the assumption that the case was governed by section 1367(d), and that a

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claim(s) is relevant to a determination of the court's jurisdiction of the subject matter.' (Citation.)" *Hagans v. Levine*, 415 U.S. 528, 542 n.10, 94 S.Ct. 1372, 1382 n.10 (1974); *Gilder v. P.G.A. Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991).

> state court action could be filed (in New York or California) within 30 days.

Petitioner's App. A at A10-A11.

> The federal district court judge did not find fault with Michaels' pursuit of the RICO claim or with his ultimate decision to abandon it. Neither do we [the California Court of Appeal] nor do we find anything in this record to suggest that Michaels acted in bad faith.

Petitioner's App. A at A12 fn. 7.

Michaels filed his Los Angeles County Superior Court action on October 24, 1995, just eighteen days after the federal district court dismissed his state law claims. "In short, Wildenstein [was] in the same position it would have been had this case been filed in the state court in the first instance." Petitioner's App. at A13.

REASONS FOR REFUSING THE WRIT

Because Section 1367(d) Merely "Codified" California State Equitable Tolling Principles The Decision Below Rests On An "Adequate State Ground."

To be sure, the Court of Appeal concluded that the plain language of section 1367(d) controlled the disposition of the case.[10] But, as an alternate ground for its conclusion, the Court of Appeal followed the ruling of a

[10] "Since this action was filed within 30 days after Michaels's federal claims were dismissed, it would appear to follow ineluctably that his action was timely." Petitioner's App. A at A9-A10.

prior California Court of Appeal, *Kolani v. Gluska*, 64 Cal.App.4th 402, 75 Cal.Rptr.2d 257 (1998). This "adequate state ground" defeats this court's jurisdiction to review the matter. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

As summarized in *Addison* [*v. State of California*, 21 Cal.3d 313, 317, 146 Cal.Rptr. 224 (1978)], the requirements for equitable tolling are that defendant must receive timely notice of the claims, defendant must suffer no prejudice, and plaintiff must act reasonably and in good faith. (Ibid.) 28 United States Code section 1367, subdivision (d) codifies the tolling doctrine and applies it in all supplemental jurisdiction cases where the pendent state claims are dismissed without prejudice. Two of the three requirements for "equitable tolling" are met in all such cases. Defendant receives notice of the claims, from the filing and service of the federal suit. Defense is not prejudiced, since defendant, if diligent, will interview witnesses and gather evidence to meet the claims in the federal suit. The third requirement, reasonable conduct by plaintiff, is addressed by subdivision (d)'s requirement that the second suit be filed within 30 days after dismissal of the pendent claims. This part of subdivision (d) substitutes a bright-line rule in place of the case-by-case analysis of "reasonableness" found in the equitable tolling cases. It affords plaintiff a reasonable time within which to get the case refiled. At the same time, it upholds the policy of the statute of limitations, by limiting the time to refile, and thus assuring that claims will be promptly pursued in any subsequent action. *Kolani v. Gluska, supra*, 64 Cal.App.4th at 409-410, 75 Cal.Rptr.2d at 261.

In other words, the California court concluded that the California equitable tolling principles corresponded

with the application of section 1367(d). It ruled on the facts before it that, because the plaintiffs had refiled their state law claims 78 days after the claims had been dismissed by the federal court, they were too late. The court held that under the California view of equitable tolling, a plaintiff who re-files within 30 days of a federal dismissal acts reasonably within the meaning of California's doctrine.

In its petition to this court, as it did below, Wildenstein rails at Michaels, alleging "bad faith." Wildenstein argues that section 1367(d) interferes with California state sovereignty because it precludes a consideration of the good or bad faith of the plaintiff in pursuing his state claims in federal court as part of a federal claim. The problem with Wildenstein's position is that it was rejected as a matter of fact by the federal judge in New York and by the California Court of Appeal when it reversed the Los Angeles County Superior Court judge. Wildenstein renewed its claim in the California Supreme Court but the court was also unmoved.

To make its "bad faith" claim in this court, Wildenstein has gone so far as to misstate the record. According to Wildenstein, Michaels "never validly invoked the federal court's jurisdiction." Petition at 3. Wildenstein is wrong. "The federal district court judge did not find fault with Michaels' pursuit of the RICO claim or with his ultimate decision to abandon it. Neither do we [the California Court of Appeal] nor do we find anything in this record to suggest that Michaels acted in bad faith." Petitioner's App. A at A12 fn. 7.

The California Court of Appeal found no offense to California sovereignty in section 1367(d).

> Although Wildenstein says this case is distinguishable from *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, Wildenstein doesn't say how. We see no distinction. As Division Seven of our Court explained in *Kolani*, section 1367(d) does not create a novel concept. It simply codifies the doctrine of equitable tolling that applies when a plaintiff with several options reasonably pursues one remedy instead of another.

Petitioner's App. A at A12.

Section 1367(d) did not compel the California Court of Appeal to decide the case in a manner contrary to California's equitable tolling doctrine. According to the California court, a plaintiff such as Michaels who files a timely state claim in federal court, serves the defendant and re-files within 30 days of an ultimate federal dismissal, brings himself within the principles of the California equitable tolling doctrine as a matter of California law. Michaels is mindful of this court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983). He believes that this separate ground for the Court of Appeal's decision is not so "interwoven" with the federal ground as to lack independence. Because the decision below rests on this "adequate state ground" the petition should be denied.

The Congressional Power To Provide For Supplemental Jurisdiction Includes The Power To Provide For The Effect On The Statute Of Limitations While The Case Is In Federal Court.

No question exists that the Congress has the power to provide a codification of former doctrines of pendent

and ancillary jurisdiction. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165 (1997). Congress also has the power to establish exceptions to that jurisdiction. *Id.*, 522 U.S. at 169.

Supplemental jurisdiction only operates on claims created by state law. The federal power is thus properly exercised in determining the effect on the state statutes of limitations of bringing state claims in federal court under supplemental jurisdiction. Otherwise, results would vary state-by-state.

In order for a plaintiff to rely successfully on subdivision (d), he must still file the federal case with the pendent state claims in a timely manner. Section 1367, subdivision (a) merely grants to the federal courts supplemental jurisdiction over all state claims which arise out of the same case or controversy as the federal claim on which jurisdiction is predicated. It extends no statute of limitations.

The state statute of limitations is maintained. The plaintiff must still bring himself within whatever time period limits the assertion of the particular cause of action. The relevant dates to be considered are the filing date in federal court, the dismissal date in federal court and the refiling date in state court.[11]

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[11] California's policy regarding the application of statutes of limitations is not offended by this analysis. The California Supreme Court recently made this observation about the operation of statutes of limitations: "Inasmuch as [the statute of limitations] "necessarily fix[es]" a "definite period[ ] of time" (Citation), it operates conclusively across the board, and not flexibly on a case-by-case basis. (Citations.) That is to say, a

For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

Since the enactment of section 1367 in 1990, only one of the sixteen reported state cases[12] mentioning subdivision (d) has addressed the constitutional claim here

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cause of action brought by a plaintiff within the limitations period applicable thereto is not barred, even if, in fact, the former is stale and the latter dilatory; contrariwise, a cause of action brought by a plaintiff outside such period is barred, even if, in fact, the former is fresh and the latter diligent." *Norgart v. The Upjohn Company*, 21 Cal.4th 383, 395, 87 Cal.Rptr.2d 453, 472 (1999).

[12] *Kendrick v. City of Eureka*, 82 Cal.App.4th 364, 98 Cal.Rptr.2d 153 (2000); *Harter v. Vernon*, 532 S.E.2d 836 (N.C.App. 2000); *Stevens v. ARCO Management of Washington D.C., Inc.*, 751 A.2d 995 (D.C. 2000); *Fennell v. Stephenson*, 528 S.E.2d 911 (N.C.App. 2000) review granted 8-25-00; *Raygor v. University of Minnesota*, 604 N.W.2d 128, (Minn.App. 2000) Review granted 3-28-00; *Wallin v. Minnesota Dept. of Corrections*, 598 N.W.2d 393 (Minn.App.1999); *Capitol House Preservation Co. v. Perryman Consultants, Inc.* 725 So.2d 523 (La.App.1998); *Kolani v. Gluska, supra*; *Rothmeier v. Investment Advisers, Inc.*, 556 N.W.2d 590 (Minn.App. 1996); *Dalal v. Alliant Techsystems Inc.*, 934 P.2d 830 (Colo.App. 1996); *Pointer v. Western Heights Independent School Dist.*, 919 P.2d 5 (Okla.1996); *Davis v. Commonwealth*, 660 A.2d 157 (Pa.Cmwlth., 1995); *Black v. Florida Dept. of Corrections*, 652 So.2d 1291 (Fla.App. 1995); *Roden v. Wright*, 646 So.2d 605 (Ala. 1994); *Grider v. USX Corp.*, 847 P.2d 779 (Okla. 1993); *Roden v. Wright*, 611 So.2d 333 (Ala. 1992).

made. That court, the North Carolina Court of Appeals, concluded: "The tolling of a statute of limitations is a regulation of the 'judicial process' and, therefore, is procedural. Accordingly, the Congress had the authority, pursuant to the Necessary and Proper Clause of the United States Constitution, to enact section 1367(d)." *Fennell v. Stephenson*, 528 S.E.2nd 911, 914-915. (N.C. App. 2000), review granted, (8-25-00). No other state appellate decision has intimated that its state's sovereignty is impermissibly impaired by subdivision (d).

The fact that subdivision (d) dictates the effect of a timely federal filing on a refiled state action does not mean that Congress has overreached. The federal courts may enter rulings which affect state claims substantively even though those cases are to be tried in state courts. In *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), a unanimous court held that a federal district court may decide questions of personal jurisdiction before addressing its own subject matter jurisdiction without offending the dignity of the state court, even if that determination precludes relitigation of the personal jurisdiction question in the state courts. This issue preclusion effect did not impermissibly interfere with states' rights. *Id.*, 526 U.S. at 586-587.

If the Congress lacked power to provide for the statute of limitations effect on state law claims properly and timely filed in federal court, a chilling effect on federal claims that varied from state to state would result. This court has concluded such a result would be undesirable.

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), the court considered whether the district courts

had power had the power to remand improperly removed cases even though the removal statute, on its face, only authorized the court to dismiss such claims. The court analyzed the dilemma facing a plaintiff with a federal claim and a state claim arising out of the same set of operational facts. "Thus, a rule that would require federal courts to dismiss a removed case that is not suitable for resolution in a federal court would operate not only to foreclose some plaintiffs from litigating their state-law claims, but also to chill other plaintiffs from bringing their federal-law claims." *Id.*, 484 U.S. at 352 n. 9.

The *Carnegie-Mellon* court also foresaw an undesirable tendency of federal courts to retain pendent state law claims, which they would otherwise dismiss, if concerns existed that state statute of limitations might have expired. *Id.*, 484 U.S. at 352 n.10. Most importantly for the resolution of the question presented by this case, the *Carnegie-Mellon* court noted the power of Congress to enact provisions in the removal statute which provided for or prohibited dismissal or remand of removed cases, with whatever attendant effect that might have on the state statute of limitations. *Id.*, 484 U.S. at 354.

The cases relied upon by Wildenstein are simply off the point. Subdivision (d) does not affect state statute of limitations in state law cases. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). The limitation period applies to the filing of the claim in federal court. If the state claim is barred when filed in the federal court, section 1367(d) does not revive it. In addition, any provisions tolling the statute of limitations pre-filing are preserved. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). The state provisions defining the "commencement" of an

action for purposes of the statute of limitations are preserved. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

The holding of *Walker* was the result of the absence of a conflicting rule of federal procedure. The court did not reach the question of whether Congress had the power to create a "commencement" rule that was uniform and controlling. *Id.*, 446 U.S. at 749-750, 752. The court's holding in *Tomanio* likewise was the result of the absence of a controlling federal rule. *Tomanio,* 446 U.S. at 488.

Wildenstein sees subdivision (d) as promoting lack of diligence, bad faith and, "worst of all," "forum shopping." Petition at 10-11. According to Wildenstein, a state court will be unable to punish the plaintiff who engages in such conduct. Wildenstein makes no sense. In order for subdivision (d) to operate, the plaintiff must have made a timely filing in federal court and a timely refiling in state court. No California policy is offended. The California Supreme Court recently held that statutes of limitations operate on a "bright line" basis. "[A] cause of action brought by a plaintiff within the limitations period applicable thereto is not barred, even if, in fact, the former is stale and the latter dilatory." *Norgart v. The Upjohn Co., supra,* 21 Cal.4th at 395, 87 Cal.Rptr.2d at 472.

Concerns of forum shopping are not grounds to reject an otherwise proper rule or statute. "[A] plaintiff already has the option for shopping for a forum with the most favorable law." *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990); *see also Carnegie-Mellon University v. Cohill, supra,* 484 U.S. at 357.

Even if the considerations Wildenstein raises were grounds for this court to take up the question of whether

section 1367(d) is constitutional, this case is a poor vehicle for addressing it. Although Wildenstein wishes otherwise, to the extent of misstating the record on this point, Michaels neither lacked diligence nor lacked good faith nor engaged in impermissible forum shopping. Wildenstein conceded that Michaels' 1993 federal filing was timely as to his state law claims. Wildenstein's Respondent's Brief in the California Court of Appeal at 23.

The California Court of Appeal rejected Wildenstein's claims that Michaels had engaged in impermissible forum shopping and bad faith. "We are not aware of any rule that prohibits a plaintiff's efforts 'to lessen the extent of his injuries' by 'maximizing' the amount of damages he will be able to recover if he wins. The federal district court judge did not find fault with Michaels' pursuit of the RICO claim or with his ultimate decision to abandon it. Neither do we nor do we find anything in this record to suggest that Michaels acted in bad faith." Petitioner's App. A at A12 n. 7.

Subdivision (d) provides a uniform rule for state claims brought initially in federal court under the supplemental jurisdiction statute, section 1367. It upholds the dignity of the state law statutes of limitations and any pre-filing tolling of them. It avoids any chilling of federal claims that would occur if a plaintiff risked forfeiting his state causes of action by joining them with a federal claim.

> "Our Federalism" does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these

> courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments.

Ruhrgas AG v. Marathon Oil Co., supra, 526 U.S. at 587.

Subdivision (d) represents a suitable balance between the interests of the states and federal government. It is a proper exercise of the congressional power to regulate practice in the federal courts.

CONCLUSION

The California Court of Appeal held that, by refiling his state claims within thirty days of their federal dismissal, Michaels satisfied the three requirements for the application of the California equitable tolling doctrine. Wildenstein's rights were "fully protected." Petitioner's App. A at A12. "We do not see how a case filed within the time permitted by section 1367(d) could reasonably be described as 'stale.' " *Id.,* at A13. This presents an adequate state ground for the court's decision.

Subdivision (d) does not interfere with state sovereignty, the Guaranty Clause or the Tenth Amendment. The state statute of limitations is preserved. The California Court of Appeal concluded aptly: "In short, Wildenstein is in the same position it would have been had this

case been filed in state court in the first instance." Petitioner's App. A at A13.

The petition should be denied.

Respectfully submitted,

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